(2)

No. 95-297

Supreme Court, U.S.
FILED
SEP 15 1995
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JOHN HUBER,
Petitioner,

v.

HOWARD COUNTY, MARYLAND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BARBARA M. COOK
Howard County Solicitor
RICHARD E. BASEHOAR
Senior Assistant County Solicitor
Counsel of Record
Howard County Office of Law
George Howard Building
3430 Courthouse Drive
Ellicott City, Maryland 21043
(410) 313-2104
Counsel for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

I. Whether a firefighter recruit with chronic bronchial asthma may demonstrate that he is "otherwise qualified" under the Rehabilitation Act to perform the duties of a "career firefighter" by showing that he has performed the less stringent duties of a "volunteer firefighter" only when his medical condition has permitted, and when he acknowledges that he will require extraordinary accommodations to reduce the risk of substantial harm presented for himself and others.

II. Whether a firefighter recruit with chronic bronchial asthma may set forth a triable issue of fact under the Rehabilitation Act by showing that extraordinary accommodations will reduce, not eliminate, the likelihood that substantial harm will result to the recruit or others should he be employed as a "career firefighter", without also establishing the "reasonableness" of his proposed accommodations.

PARTIES

The caption of the case in this Court contains the names of all parties to the proceedings before the United States District Court for the District of Maryland ("District Court") and the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit").

Howard County, Maryland ("County") is a chartered county formed pursuant to the legislative grant of authority contained in Article 25A of the Annotated Code of Maryland, and has no parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	11
I. THE DISTRICT COURT AND FOURTH CIRCUIT CORRECTLY CONCLUDED THAT THE REHABILITATION ACT REQUIRED HUBER TO DEMONSTRATE THAT HE WAS "OTHERWISE QUALIFIED" TO PERFORM THE DUTIES OF A "CAREER FIREFIGHTER", AND THAT HE FAILED TO MEET THIS BURDEN BY SHOWING THAT HE HAD PERFORMED THE LESS STRINGENT DUTIES OF A "VOLUNTEER FIREFIGHTER" ONLY WHEN HIS CHRONIC MEDICAL CONDITION PERMITTED	11
II. THE DISTRICT COURT AND THE FOURTH CIRCUIT CORRECTLY CONCLUDED THAT WITHOUT ESTABLISHING THE "REASONABLENESS" OF THE ACCOMMODATIONS HE PROPOSED, HUBER COULD NOT SET FORTH A TRIABLE ISSUE OF FACT UNDER THE REHABILITATION ACT BY SIMPLY ALLEGING THAT THE ACCOMMODATIONS WOULD REDUCE, NOT ELIMINATE, THE LIKELIHOOD THAT SUBSTANTIAL HARM WOULD RESULT TO HIMSELF OR OTHERS SHOULD HE BE EMPLOYED AS A "CAREER FIREFIGHTER".	15

TABLE OF CONTENTS—Continued

Page

A. An Accommodation Is Not Reasonable If It Either Imposes An Undue Financial Or Administrative Burden Or Requires A Fundamental Alteration In The Nature Of The Job 16

B. An Individual Who Cannot Perform The Essential Functions Of A Job Requiring The Performance Of Safety Sensitive Functions Without Endangering The Health Or Safety Of Himself Or Others Is Not "Otherwise Qualified" 20

CONCLUSION 22

APPENDIX

(Excerpts from the Agreed Statement of Facts) 1a

(Excerpts from the deposition of James L. Gamble, III) 6a

(Excerpts from the deposition of Michael G. Hayes) 11a

TABLE OF AUTHORITIES

CASES Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 14
B&O Railroad v. Bowen, 482 A.2d 921 (Md. Ct. Spec. App. 1984) 15
Bey v. Bolger, 540 F. Supp. 910 (E.D. Pa. 1982) 20
Bucyrus-Erie Co. v. State Department of Industry, 280 N.W.2d 142 (Wis. 1979) 15
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 14
Chiari v. City of League City, 920 F.2d 311 (5th Cir. 1991) 16
Davis v. Meese, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989) 21
Dexler v. Tisch, 660 F. Supp. 1418 (D. Conn. 1987) 19, 20
DiPompo v. West Point Military Academy, 770 F. Supp. 887 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 326 (2nd Cir. 1992) 12, 20
Jasany v. United States Postal Service, 755 F.2d 1244 (6th Cir. 1985) 19
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) 14
McCullough v. Branch Banking & Trust Co., 35 F.3d 127 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995) 10
Office of Occupational Medicine and Safety v. Baltimore Community Relations Com., 594 A.2d 1237 (Md. Ct. Spec. App. 1991) 15
School Board of Nassau County v. Arline, 480 U.S. 273 (1987) 12, 14, 17, 19
Serrapica v. City of New York, 708 F. Supp. 64, *aff'd*, 888 F.2d 126 (2nd Cir. 1989) 21
Southeastern Community College v. Davis, 442 U.S. 397 (1979) 17, 19, 20
Tyndall v. National Education Centers, Inc., 31 F.3d 209 (4th Cir. 1994) 12
Walders v. Garrett, 765 F. Supp. 303 (E.D. Va. 1991), aff'd, 956 F.2d 1163 (4th Cir. 1992) 12, 19
Ward v. Skinner, 943 F.2d 157 (1st Cir. 1991), *cert. denied*, 503 U.S. 959 (1992) 21

TABLE OF AUTHORITIES—Continued

Page

Wolsky v. Medical College of Hampton Roads, 1 F.3d 222 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 881 (1994) 10

STATUTES & REGULATIONS

28 U.S.C. § 1254(1) 2
29 U.S.C. § 794 ..... *passim*
42 U.S.C. §§ 12101-12213 16
29 C.F.R. § 1613.702(f) 11, 16, 17
29 C.F.R. § 1630.2(r) 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-297

JOHN HUBER,

Petitioner,

v.

HOWARD COUNTY, MARYLAND,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Howard County, Maryland ("County"), respectfully requests that this Court deny the Petition for Writ of Certiorari filed by the Petitioner, John Huber ("Huber").

OPINIONS BELOW

The opinion of the United States District Court is reported at 849 F. Supp. 407 (D.Md. 1994) and is reproduced in the Petitioner's Appendix commencing at Pet. App. 1.[1] The per curiam opinion of the Fourth Circuit is reproduced in the Petitioner's Appendix commencing at Pet. App. 27.

---

[1] References to the opinions below shall be to the appropriate page(s) of the Petitioner's Appendix and shall be designated as follows: (Pet. App. ——).

JURISDICTION

On April 15, 1994, the District Court granted summary judgment to the County upon Huber's claim that the County unlawfully discriminated against him under § 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Rehabilitation Act"), when the County discharged Huber from his position as a firefighter recruit on March 23, 1990. The Fourth Circuit upheld the District Court's judgment in an unpublished opinion dated March 24, 1995. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

29 U.S.C. § 794(a) provides, in pertinent part:

> "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving Federal financial assistance. . . ."

STATEMENT OF THE CASE

A. Undisputed Facts.

In the District Court, the parties entered into a lengthy and detailed "Agreed Statement of Facts", which was supplemented with deposition testimony. The County also submitted evidence through affidavits which Huber did not dispute. The District Court's opinion contains a thorough discussion and summary of the undisputed facts (Pet. App. 9-15), as does the opinion of the Fourth Circuit (Pet. App. 28-32). Huber's Petition, oppositely, omits important facts and is replete with unsupported allegations and misstatements of fact. As a result, the Respondent sets forth below the undisputed facts which are relevant to the Court's consideration of the Petition.

The County is a chartered county formed pursuant to the legislative grant of authority contained in Article 25A

of the Annotated Code of Maryland (Resp. App. 1, ¶ 1).[2] Prior to the adoption of the charter form of government by Howard County voters in 1969, fire and emergency services in the County were performed solely by several volunteer fire corporations formed as non-profit corporations under Maryland law (Resp. App. 1, ¶ 2). In adopting the Charter, the voters of the County approved the creation of the County's Department of Fire and Rescue Services ("DFRS") (Resp. App. 1-2, ¶ 3). From that time to the present, fire and emergency services in the County have been provided both by the members of six separate volunteer corporations ("volunteer firefighters") and employees of DFRS ("career firefighters") (Pet. App. 9; Resp. App. 2, ¶ 4).[3]

Volunteer firefighters, however, are not required to meet the many requirements established for career firefighters. For example, volunteer firefighters are not required to pass physical fitness or agility tests, to participate in County sponsored training, to participate in physical training exercises, or to submit to physical agility testing and a medical examination on an annual basis. Volunteer firefighters may also choose to limit the functions which they perform during a fire emergency. Most significantly, unlike career firefighters, volunteer firefighters have the discretion of not responding to a fire (Pet. App. 9, 19; Resp. App. 4-5, ¶ 60-63).

In 1986 and 1987 respectively, Huber applied and was accepted for membership by the Ellicott City Fireman's Association, Inc. and the West Friendship Volunteer Fire-

---

[2] Pertinent portions of the record before the District Court and Fourth Circuit are reproduced in the Respondent's Appendix. References to these materials shall be to the appropriate page(s) of the Respondent's Appendix, and the paragraphs thereof, if any, as follows: (Resp. App. ——, ¶ ——).

[3] At page 4 of the Petition, Huber incorrectly asserts that the volunteer corporations are part of DFRS, rather than separate and independent entities (Resp. App. 2, ¶ 4).

man's Association, two of the non-profit, non-stock corporations providing emergency services in the County (Pet. App. 9, 28).[4] As a volunteer firefighter, Huber thereafter successfully completed several training courses (Pet. App. 28).

On March 30, 1989, Huber applied to the County for the paid position of Firefighter/CRT Recruit ("Recruit") with DFRS (Pet. App. 9, 28). On November 11, 1989, during a medical examination required of all recruits, Huber reported to a County physician that he had a history of "childhood asthma", and that his last asthmatic episode had occurred in 1986. During this examination Huber denied taking oral medication for his asthma between 1986 and the time of the examination, but disclosed that he used an inhaler, a compressed gas cylinder used to dispense medication to the lungs. Huber did not disclose, however, that he had suffered a severe asthmatic episode requiring hospital treatment on May 25, 1989. Upon this flawed and incomplete history, the County physician recommended that the County hire Huber as a Recruit, and Huber began his training on February 12, 1990 (Pet. App. 9-10, 28-29).[5]

As a recruit, Huber was required to participate in a physical training program in the County's fire academy, which was intended both to physically prepare the re-

---

[4] At pages 4 and 9 of the Petition, Huber incorrectly asserts both that he applied to the County to become a volunteer and that his volunteer service was given to the County. The volunteer corporations have their own membership standards (Pet. App. 19).

[5] At page 10 of the Petition, in footnote 4, Huber asserts that the Fourth Circuit wrongfully criticized Huber for misconduct akin to "resume fraud", and points out that Huber could not have disclosed his May, 1989 hospitalization on his March, 1989 application. Conspicuously, however, Huber offers no explanation here, and did not below, why the May, 1989 hospitalization was not reported in his November 1989 medical examination. This fact, of course, properly caused the Fourth Circuit to suggest that Huber may have intentionally misrepresented his medical history in order to be hired.

cruits and to measure their ability to perform the physically demanding duties of a career firefighter, such as pulling hoselines, throwing and raising ground ladders, opening holes in roofs and walls using an axe, gaining entry through a locked door, operating heavy duty extrication tools, and participating in salvage operations (Pet. App. 10, 29; Resp. App. 2-4, ¶ 48-60). Recruits were, for example, expected to run 1.5 miles in under 13 minutes. While a recruit's failure to meet this time requirement in any one exercise would not disqualify the recruit, all recruits were required to meet this standard in order to successfully complete the fire academy's training program (Pet. App. 10, 29).[6]

Huber, however, experienced great difficulty performing the running exercises in the Fire Academy, which began on February 12, 1990, even while using an inhaler for his asthma. On February 14, 1990, Huber needed to use an inhaler to aid his breathing during the exercise. The next day, Huber also failed to complete the run and was referred to the County's physician for an additional medical examination. The County's physician issued a report on February 16 stating that Huber appeared fit but suggesting further evaluation in light of Huber's breathing difficulties during the running exercises. On February 19, Huber took 13:02 minutes to complete the running exercise. On February 22, Huber again experienced difficulty in the exercises, had to use his inhaler, and told his instructor that he "didn't want to bring on anything" and

---

[6] At page 8 of the Petition, in footnote 3, Huber now attempts to change the record and improperly suggests that he executed the Agreed Statement of Facts believing a 13:00 minute standard for a 1 1/2 mile running exercise was applied to recruits, but that he later located other documents indicating a more flexible standard applied. The document to which Huber refers, however, was referred to in Paragraph 60 of the Agreed Statement of Facts and attached as an Exhibit thereto. The standards referenced applied to firefighters who had successfully completed their recruit training, and who, unlike volunteer firefighters, are subjected to medical and fitness reviews on a continuing basis (Resp. App. 4, ¶ 60).

that "I can't run the pace in cold weather so I slow down and continue running" (Pet. App. 10-11, 29).

Due to Huber's continuing problems and the County physician's suggestion for further examination, the County's Office of Personnel required Huber to report to his treating physician. On February 27, 1990, Huber's personal physician, Dr. James Kopper, a pediatrician, responded in the Office's questionnaire that Huber "most likely" could perform the firefighting duties with medication but that he could not perform the duties without medication. Recognizing that as a pediatrician he lacked the qualifications to render a definitive opinion in the specialty of pulmonary medicine, Dr. Kopper added that "if there is any further question regarding his capability —-perhaps an evaluation by a pulmonologist or allergist would be appropriate." (Pet. App. 11, 29).[7]

On February 28, 1990, the County's Office of Personnel informed Huber that he could not carry his inhaler while participating in the fire academy. The County's decision was based in part upon the danger of explosion which existed if the compressed gas cylinder was exposed to the high temperatures of firefighting operations. The decision was also based upon the County's belief that the inability to predict fire emergencies, the delayed effectiveness of inhaled medication, and the difficulty which a firefighter would experience in accessing such medication during a fire emergency, where a firefighter is expected to use a breathing apparatus, helmet, facepiece, and gloves, renders the use of a bronchodilator incompatible with fire operations (Pet. App. 21-22).[8] That day,

---

[7] At page 9 of the Petition, Huber wholly misrepresents the opinions of the physicians by suggesting that the County physician and Huber's pediatrician unqualifiedly stated that he was fit for duty as a career firefighter.

[8] At page 10 of the Petition, in footnote 5, Huber inappropriately aserts both that the Fourth Circuit misconstrued an argument which he made concerning his inhaler and that he established in

Huber took 14:14 minutes to finish the 1.5 mile run, and the next day he stopped running after one mile, telling his instructor that his legs hurt but that he had no trouble breathing. On March 5, Huber stopped running, stating that he needed to clear his lungs. Finally, on March 6, Huber stopped running during a 2.2 mile running exercise and finished eight minutes behind the average class time (Pet. App. 12, 30).

On March 1, 1990, the County referred Huber to Dr. Michael G. Hayes, the Director of Pulmonary Diseases at Maryland General Hospital. Dr. Hayes examined Huber on March 2, 1990 and issued a written opinion on March 8, which stated:

> My impression is that Mr. Huber has significant bronchial asthma, which is not being very well controlled with medication . . . . Although I am unable to predict the course of his asthma, I can not honestly recommend that it would be safe for him or the people that he worked with to have him function as a firefighter . . . . I strongly recommend that he not be hired as a firefighter.

(Pet. App. 30). Dr. Hayes also submitted an affidavit in this proceeding, in which he stated that "based upon a reasonable degree of medical certainty," and given the demands placed on firefighters at the scene of a fire, including rapidly fluctuating temperature conditions, work at or near maximal heart rates, and exposure to hazardous and toxic fumes and substances, there is no medical plan or scheme which would enable Huber to perform firefighting duties without a risk of substantial harm to himself, his co-workers, or members of the public (Pet. App. 12, 30).

---

the District Court that the inhaler posed no risk of explosion. As the District Court noted in its opinion, however, Huber did not contest the legitimacy of the County's concerns, and himself introduced an exhibit, from a Physician's Desk Reference, indicating that exposure to high temperatures could cause bursting of the inhaler (Pet. App. 21).

On March 12, 1990, the County advised Huber that it was proposing to terminate his employment. The letter from the Director of DFRS advising Huber of this fact read, "As a result of a pulmonary evaluation requested by Howard County, it has been determined that you have a chronic medical condition that incapacitates you from the performance of your duties . . . ." After a hearing, the Director determined that Huber should be dismissed, and the County advised Huber on March 19, 1990, of his dismissal and rights of appeal. Huber, however, did not file an administrative appeal, and his termination became effective on March 23, 1990 (Pet. App. 12-13, 30).

After his discharge, Huber continued, from time to time, to provide some measure of service as a volunteer firefighter. He did so, however, only when his asthmatic condition permitted, and admitted in depositions that he had, on numerous occasions, declined from going on calls because he was not feeling well (Pet. App. 19). Following his discharge, Huber was also seen at least nine times by doctors for breathing problems and was hospitalized for such problems on at least two of those occasions (Pet. App. 13).

On February 25, 1993, Huber filed this action in the District Court alleging that the County violated the Rehabilitation Act. During this proceeding, some three years and ten months following his discharge, Huber obtained an additional medical opinion, not from a pulmonologist, but from a specialist in occupational medicine, Dr. James L. Gamble, III.[9] In forming his opinion of Huber's condi-

---

[9] Notwithstanding the fact that the relative qualifications of the expert witnesses for both parties were not material to the decisions rendered below, Huber attempts at page 10 of the Petition to buttress the opinion of his expert by stating that Dr. Gamble has undertaken "extensive study" of pulmonology. The record evidence reveals, however, that Dr. Gamble is not a pulmonologist, has no affiliation with any hospital, devotes his practice to providing medical consultation and treatment for the clients of approximately 200 plaintiff's attorneys, and that his study of pulmonology

tion, Dr. Gamble examined Huber on January 24, 1994, and considered Huber's medical history. In his assessment dated January 24, 1994, Dr. Gamble noted specifically that Huber's asthma is cold and exercise-induced (Pet. App. 19), and wrote, in pertinent part:

> I believe, [however], that his long history of fighting fires without significant problems and his history of several day onset of asthma, [however], provide evidence that accommodations could adequately protect him. The accommodations that I suggest are that the supervisors, who are all trained in auscultation, listen to him at the beginning of each work day of service. If they found wheezes, rhonchi or rales then he should be referred to their medical department, where further determination of his work status can be made. In addition, when he is exposed to smoke while fighting a fire and has to report to his rehabilitation center that the EMS technicians auscultate his lungs and again check for wheezes, rhonchis and rales. If he is found to have a problem, then he should again report to the firefighter's medical department for further evaluation. Therefore, within a reasonable degree of medical certainty, it is most improbable, that the patient would subject himself or others to injury as the result of his asthma with these accommodations.[10]

(Bracketed words were stricken in original) (Pet. App. 31-32).

B. The Litigation.

On February 25, 1993, Huber filed this action in the District Court alleging that the County violated the Re-

---

was limited to a single course during his residency program (Resp. App. 6-10).

[10] Dr. Gamble's proposed accommodations were based upon an erroneous assumption that the County had both a "medical department" and a "rehabilitation center." As the District Court correctly noted in its opinion, however, the record evidence indicated that the County had neither (Pet. App. 23).

habilitation Act when it discharged Huber from the position of firefighter recruit. The County filed, on April 8, 1993, a motion to dismiss or, in the alternative, for summary judgment, contending both that DFRS was not a recipient of federal financial assistance and that Huber's claim was time-barred. In raising the limitations issue, the County argued that the six-month limitations period in Section 9A(a) of Article 49B of the Annotated Code of Maryland should apply to Huber's claim. By a Memorandum and Order dated August 4, 1993, the District Court held that Huber's claim was not barred by the limitations period established under this section.

On May 24, 1995, the Fourth Circuit upheld the District Court's decision granting summary judgment to the County, and agreed with the District Court that Huber was not otherwise qualified for the position of a career firefighter, and that the County did not unreasonably fail to accommodate Huber's disability.[11]

---

[11] Having reached this decision, the Fourth Circuit did not address the County's contention on appeal that Huber's claims were barred by limitations based upon the Fourth Circuit's decisions in *Wolsky v. Medical College of Hampton Roads*, 1 F.3d 222 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 881 (1994), and *McCullough v. Branch Banking and Trust Co.*, 35 F.3d 127 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1101 (1995), both of which were entered after the District Court's decision on August 4, 1993.

REASONS FOR DENYING THE WRIT

I. THE DISTRICT COURT AND FOURTH CIRCUIT CORRECTLY CONCLUDED THAT THE REHABILITATION ACT REQUIRED HUBER TO DEMONSTRATE THAT HE WAS "OTHERWISE QUALIFIED" TO PERFORM THE DUTIES OF A "CAREER FIREFIGHTER", AND THAT HE FAILED TO MEET THIS BURDEN BY SHOWING THAT HE HAD PERFORMED THE LESS STRINGENT DUTIES OF A "VOLUNTEER FIREFIGHTER" ONLY WHEN HIS CHRONIC MEDICAL CONDITION PERMITTED.

Huber first contends that his Petition for Writ of Certiorari should be granted because the Supreme Court "has not addressed the significance of volunteer work when evaluating whether a person is otherwise qualified" under the Rehabilitation Act. With much vitriol and without in any fashion distinguishing the authority upon which the lower courts relied, Huber also suggests at page 5 of his Petition that the District Court and Fourth Circuit "engaged in the same prejudice against the handicapped that laws against disability discrimination were intended to remedy". He simply argues, at page 14 of the Petition, that his performance of the less stringent duties of a volunteer firefighter alone establishes his qualification to perform the duties of a career firefighter in the County.

Huber's Petition should be denied, however, because the Petition ignores the burden which he was required to sustain under the Rehabilitation Act, as well as the differences between the positions of career and volunteer firefighter. To establish a case of employment discrimination, Huber was required in this case to show that he was an individual with a disability under the statute; that he was otherwise qualified,[12] which means that he could

[12] The lower courts correctly identified the applicable regulation to be 29 C.F.R. § 1613.702(f), which defines an otherwise qualified

perform the essential functions of the specific *job in question*; and that he was excluded from the employment *solely* [13] because of his disability. *See School Board of Nassau County v. Arline*, 480 U.S. 273, 287, n.17 (1987); *Walders v. Garrett*, 765 F. Supp. 303, 312 (E.D. Va. 1991), *aff'd*, 965 F.2d 1163 (4th Cir. 1992); *DiPompo v. West Point Military Academy*, 770 F. Supp. 887, 892 (S.D.N.Y. 1991), *aff'd*, 960 F.2d 326 (2nd Cir. 1992). In *DiPompo*, in fact, the Court specifically rejected a contention that service as a volunteer firefighter established qualification for a career firefighter position where the requirements of the respective positions were not the same.

The difference between the positions of a career firefighter and a volunteer firefighter in this case are great, and ably summarized by the District Court in its opinion. First, as the District Court found, the volunteer corporations are separate entities who own their own stations and support their operations, in part, with money they raise themselves. As separate entities, the volunteer cor-

---

employee with a disability as one who can perform the essential functions of a job with a reasonable accommodation. An analysis of the reasonableness of the Petitioner's proposed accommodations is made elsewhere in the County's Brief in Opposition.

[13] While not central to the issues raised by Huber's Petition, Huber misrepresents the facts when he asserts at pages 8 and 14 of the Petition that he was referred for medical evaluation when his "asthma" came to the attention of his training supervisor, and that the County requires its firefighters to be "asthma free". While Huber failed to disclose the severity of his condition to the County's physician, the County clearly hired Huber and placed him in its fire academy knowing he had asthma (Pet. App. 9-10, 28-29). Huber cannot, therefore, establish that he was discharged *solely* for reason of his asthmatic condition. The County's hiring of Huber with knowledge of his asthmatic condition, in fact, raised a strong inference that the County's discharge decision was not based upon irrational fears, patronizing attitudes, or stereotypes about the nature or effect of bronchial asthma. *Tyndall v. National Education Centers, Inc.*, 31 F.3d 209 (4th Cir. 1994).

porations establish their own membership standards and do not require their volunteers to meet the requirements established for career firefighters, or to participate in the training and testing programs which the County establishes for its career firefighters (Pet. App. 9, 19; Resp. App. 4, 5, ¶¶ 60-61).

More significantly, however, the District Court correctly discerned from the stipulated record that volunteer firefighters, unlike career firefighters, have the discretion of not responding to a fire (Pet. App. 19; Resp. App. 5, ¶¶ 62-63). For example, and notwithstanding his bald assertion at page 6 of the Petition that his work as a volunteer was "unblemished", it bears repeating that Huber admitted in depositions that he had, on numerous occasions, declined from going on calls because he was not feeling well (Pet. App. 19).

Finally, an examination of the medical testimony advanced by both parties in this proceeding reveals that Huber's participation in fire operations as a volunteer is not predictive of his ability to perform the physically demanding duties of a career firefighter. As the lower courts noted, an affidavit submitted by the County's pulmonologist, Dr. Hayes, indicated that there was no medical plan or scheme which would permit Huber to perform firefighting duties without a risk of substantial harm to himself, co-workers, or members of the public. In Huber's deposition of Dr. Hayes, moreover, the County's pulmonologist quantified this risk as very high or probable, and certainly greater than a 50-50 chance. Dr. Hayes also stated that Huber's service as a volunteer meant little, given the unpredictable nature of asthma (Pet. App. 19; Resp. App. 11-12).[14]

---

[14] Again misrepresenting the record which was before the District Court, Huber incorrectly states at page 17 of the Petition, without making any reference to record evidence, that Dr. Hayes did not quantify in his deposition whether the risk of substantial

Likewise, and ironically, Huber's own medical expert at no time stated that Huber's prior service as a volunteer provided evidence that Huber could perform the duties of a career firefighter without accommodation. Instead, in the same report in which he stated that Huber had asthma which was cold and exercise-induced, Dr. Gamble fully accepted Huber's assertions regarding his service as a volunteer, but nonetheless recommended the laundry list of accommodations which he stated would be necessary to reduce, not eliminate, the substantial risk of harm which was presented (Pet. App. 19, 31).

Upon the foregoing, it is apparent that the District Court did not, as Huber asks this Court to believe, ignore Huber's service as a volunteer firefighter (Pet. App. 25). To the contrary, the District Court examined the *specific job* of a career firefighter as it was required to do, *Arline*, 480 U.S. at 287 n.17, and discerned the significant differences between the two positions. Further, given Huber's admission that he had been unable to "answer the bell" as a volunteer, his inability to meet performance expectations in the fire academy, and his own expert's opinion that he could not safely perform the duties of any firefighting position without receiving a continuous series of medical evaluations which, if positive, would require the cessation of his emergency activities, there was simply no evidence upon which a jury could reasonably find for Huber. In fact, in the face of these undisputed facts, the trial judge had an affirmative obligation to prevent Huber's factually unsupported claims from proceeding to trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, (1986).

---

harm was "probable." This statement is simply untrue (Resp. App. 11-12).

II. THE DISTRICT COURT AND THE FOURTH CIRCUIT CORRECTLY CONCLUDED THAT WITHOUT ESTABLISHING THE "REASONABLENESS" OF THE ACCOMMODATIONS HE PROPOSED, HUBER COULD NOT SET FORTH A TRIABLE ISSUE OF FACT UNDER THE REHABILITATION ACT BY SIMPLY ALLEGING THAT THE ACCOMMODATIONS WOULD REDUCE, NOT ELIMINATE, THE LIKELIHOOD THAT SUBSTANTIAL HARM WOULD RESULT TO HIMSELF OR OTHERS SHOULD HE BE EMPLOYED AS A "CAREER FIREFIGHTER".

Huber also contends at page 17 of his Petition that a Writ of Certiorari should be granted because the Supreme Court "has never addressed whether the risk of harm must rise to the level of a mere possibility or whether it must rise to a level of a probability." Ignoring entirely the accommodations which his expert proposed, as well as the numerous federal court cases which squarely address this issue, including those cited specifically by the District Court, Huber relies instead upon several state court cases, which are readily distinguishable,[15] and argues that an employer must establish that a risk of harm to health and safety is probable before an appli-

---

[15] In a futile attempt to locate case law supporting his position, Huber relies upon several decisions involving state discrimination laws, rather than the Rehabilitation Act. In each of the cases cited by Huber, *B&O Railroad v. Bowen*, 482 A.2d 921 (Md. Ct. Spec. App. 1984), *Office of Occupational Medicine and Safety v. Baltimore Community Relations Com.*, 594 A.2d 1237 (Md. Ct. Spec. App. 1991), and *Bucyrus-Erie Co. v. State Department of Industry*, 280 N.W.2d 142 (Wis. 1979), the employers conceded applicants could presently meet the requirements of the respective positions, but argued that the applicant's performance of the duties of the jobs would likely destabilize the applicant's physical conditions, thereby putting the applicants *themselves* in danger. In contrast, the County's employment decision was based upon its belief, supported by expert medical opinion, that Huber's chronic condition would preclude performance of his job responsibilities, both now and in the future, and place himself *and others* at risk.

cant or employee with a disability may be denied employment.[16] Presumably, under Huber's theory, an airline would be forced to hire a pilot who presented 50-50 chance of having a heart attack or seizure every time the pilot operated an airplane, simply because the risk of harm did not rise to the level of a probability.

A. An Accommodation Is Not Reasonable If It Either Imposes An Undue Financial Or Administrative Burden Or Requires A Fundamental Alteration In The Nature Of The Job.

Huber's Petition on this ground should first be denied because he did not establish in the lower courts that his asthmatic condition could be reasonably accommodated. No doubt recognizing that they are manifestly unreasonable, Huber conspicuously fails to detail the specific accommodations proposed by his medical expert. Similarly, Huber fails to reveal that the Fourth Circuit found it unnecessary to even determine whether Huber had proven that the accommodations would enable him to perform the essential functions of a career firefighter without either a possible or probable risk of harm to himself and others. Because it agreed with the District Court's reasoning that Dr. Gamble's accommodations were not reasonable and

---

[16] Huber also unnecessarily invokes regulations promulgated to implement the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 ("ADA"). While the regulation found applicable by the lower courts, 29 C.F.R. § 1613.702(f), pertains to § 501 of the Rehabilitation Act, which itself refers to the duty of federal, rather than federally funded employers, the health and safety requirement under § 501 has been found to exist under § 504. *See Chiari v. City of League City*, 920 F.2d 311, 317 (5th Cir. 1991). Further, even assuming that the ADA regulations promulgated after Huber's discharge are properly applied, it is significant that Huber selectively quotes from these regulations and fails to note that the regulations also indicate that the *duration of the risk* and the *nature and severity of the potential harm* are two factors which must be considered in determining whether an individual poses a direct threat, not just the likelihood that some harm will occur. 29 C.F.R. § 1630.2(r).

would cause undue hardship to the County, the Fourth Circuit determined that the issue of the risk of harm presented was one of academic interest only (Pet. App. 37).

The applicable regulation to which the lower courts referred in making their decision that Huber had not established that his asthmatic condition could be accommodated, 29 C.F.R. § 1613.702(f), defines an otherwise qualified employee with a disability as one who can perform the essential functions of a job with a reasonable accommodation. The key word in this definition, of course, is "reasonable". "An accommodation is not reasonable if it either imposes 'undue financial or administrative burdens' . . . or requires 'a fundamental alteration in the nature of the program.'" *Arline*, 480 U.S. at 287 n.17 (citations omitted) (quoting *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)).

As the Fourth Circuit cogently observed, Huber contended in his complaint that his condition could be accommodated with medication alone,[17] but supplied an opinion from a medical expert which did not support this contention (Pet. App. 36). Again, Dr. Gamble's only prescription for accommodating Huber was:

> The accommodations that I suggest are that the supervisors, who are all trained in auscultation, listen to him at the beginning of each workday of service.[18] If they found wheezes, rhonchi or rales

---

[17] Huber, of course, was required to abandon this theory given the fact that his use of the inhaler during the fire academy did not assist him in successfully completing physical exercises (Pet. App. 10-11, 29), and since he could not explain why it was that he was unable to answer the bell as a volunteer if he was at all times able to perform the duties of a firefighter with medication or an inhaler alone (Pet. App. 19).

[18] Although Huber points to the continuous monitoring of his lungs as a reasonable accommodation, he fails to address the potential liability inherent in any such accommodation. It is self-evident

> then he should be referred to their medical department, where further determination of his work status can be made. In addition, when he is exposed to smoke while fighting a fire and has to report to his rehabilitation center that the EMS technician auscultate his lungs and again check for wheezes, rhonchis and rales. If he is found to have a problem, then he should again report to the firefighter's medical department for further evaluation.

(Pet. App. 31).

The District Court correctly identified and succinctly summarized both the unreasonableness and the hardships inherent in Dr. Gamble's proposed accommodations. The District Court stated:

> To begin with, contrary to Dr. Gamble's assumption, the County Fire Department has no on-site medical department or rehabilitation center, and commonsense suggests that establishing and maintaining such departments to accommodate plaintiff would entail substantial cost. Moreover, the fact that plaintiff's lungs are clear at the start of the day would not guarantee that Huber's lungs would remain clear at the scene of a fire or at any other time during a work shift. Even if Huber were further examined at the site of a fire, his potential incapacitation could require that he be removed from service. That contingency would mean that the County would have to increase its staffing requirements at stations to which Huber is assigned in order to have enough active firefighters at the scene.

(Pet. App. 23)

The accommodations proposed by Dr. Gamble, moreover, are inherently unreasonable because they require the

---

that Huber's co-employees, as well as the County, by permitting or endorsing such an accommodation, expose themselves to liability in the event that Huber suffers an asthma attack after a co-employee, who is not a licensed physician, determines that the condition of his lungs enables him to perform.

County and its employees to make a continuous series of evaluations as to Huber's readiness to perform his job. As the District Court observed, 'Huber has not provided or even proffered evidence that he can perform the most essential function of a career firefighter, namely to be available, in a healthy physical condition at any, random moment during his shift—'in spite of his handicap' " (Pet. App. 20) (quoting *Davis*, 442 U.S. at 406). As an employer, the County is not required to make continuous determinations as to whether its firefighters, on any given day or at any given moment, are physically capable of performing their job. Such a requirement would render meaningless this Court's mandate in *Davis*, 442 U.S. 397, which extends the protections of the Rehabilitation Act to disabled persons who can perform *in spite of* their disability. Huber asked the lower courts, in effect, to order the County to lower its fitness standards by measuring Huber's physical fitness on a continual basis. Such a result is not an "accommodation" at all, but rather is a fundamental alteration of the career firefighter position. *See Jasany v. United States Postal Service*, 755 F.2d 1244, 1250-1251 (6th Cir. 1985) (holding that an employer is not required to accommodate by eliminating one of job's essential functions); *Davis*, 442 U.S. at 413 (holding that the Rehabilitation Act imposes no requirement to lower or to effect substantial modifications of standards to accommodate a disabled person).

Reduced to its simplest terms, Dr. Gamble's recommendation was that Huber should be allowed to work only when his physical condition permitted. This proposed accommodation asked for more than the law required and would place an undue hardship on the County. *See Walders v. Garrett*, 765 F. Supp. 303 (E.D. Va. 1991), *aff'd*, 956 F.2d 1163 (4th Cir. 1992). As stated previously, an accommodation is simply not reasonable if it imposes undue financial and administrative burdens, or requires a fundamental alteration in the nature of the job. *See Arline*, 480 U.S. at 287 n.17. *See also Dexler v.*

Tisch, 660 F. Supp. 1418, 1427-29 (D. Conn. 1987) (not assigning a normal task to handicapped employees, doubling up tasks, or measures that will cause significant loss of efficiency may constitute undue hardship); *Bey v. Bolger*, 540 F. Supp. 910, 927 (E.D. Pa. 1982) (employer not required to adopt accommodation that would reduce efficiency to non-acceptable level). At most, determining whether Huber's lungs were clear during a fire emergency might reduce the risk of harm to Huber. This accommodation, however, would not answer the question of how the County was to then conduct effective fire operations.

B. An Individual Who Cannot Perform The Essential Functions Of A Job Requiring The Performance Of Safety Sensitive Functions Without Endangering The Health Or Safety Of Himself Or Others Is Not "Otherwise Qualified".

Even if Huber had established the reasonableness of his proposed accommodations, his Petition would nevertheless rightly be denied because this Court has stated that nothing in the language or history of the Rehabilitation Act reflects an intention to limit the freedom of employers to require reasonable physical qualifications. *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). A determination of the reasonableness of physical qualifications, of course, necessarily entails an evaluation of the job itself, its setting, and the nature and severity of the hazards which are presented both to the employee and others. Indeed, federal courts considering this issue have consistently held that an employer faces a lesser burden with respect to establishing both the job-relatedness and the reasonableness of physical qualifications where there is a demonstrable need for a particular ability in the performance of safety-sensitive functions. *See DiPompo v. West Point Military Academy*, 770 F. Supp. 887, 892 (S.D. N.Y. 1991), *aff'd*, 960 F.2d 326 (2nd Cir. 1992) (holding that a dyslexic volunteer fire-

fighter who sought to be employed as a career firefighter was not otherwise qualified since his inability to read and identify words and symbols could pose a significant danger to himself and to others in emergencies); *Ward v. Skinner*, 943 F.2d 157 (1st Cir. 1991), *cert. denied*, 503 U.S. 959 (1992) (holding that persons with a history of epilepsy and the use of anti-convulsive medication could be disqualified from driving a commercial truck because of the risk of injury to themselves and others); *Serrapica v. City of New York*, 708 F. Supp. 64, *aff'd*, 888 F.2d 126 (2nd Cir. 1989) (holding that an individual with diabetes was not qualified to operate heavy sanitation equipment in traffic because of the risk of injury to himself and others); *Davis v. Meese*, 692 F. Supp. 505 (E.D. Pa. 1988), *aff'd*, 865 F.2d 592 (3rd Cir. 1989) (holding that an insulin-dependent diabetic was not qualified to be an FBI agent because of the risk of dire consequences which would be presented if an agent were to suffer an incident while on duty). None of these cases required the employer to show that the risk of harm was "probable".

In this proceeding, however, the County's pulmonologist, Dr. Hayes, quantified the risk of substantial harm posed to Huber and others as "probable" should Huber be employed as a career firefighter, and stated that there is no medical plan or regimen which would enable Huber to perform the duties of a career firefighter (Pet. App. 12, 30; Resp. App. 11-12). Dr. Gamble, Huber's own expert, stated that even with his proposed accommodations, which are patently unreasonable for the reasons previously stated, Huber would still pose a ten percent risk of danger to himself and others if he were to be employed as a career firefighter (Pet. App. 25). Thus, given the life and death circumstances which face career firefighters on a daily basis, the District Court was right to conclude that the County was not legally required to assume such a risk upon the foregoing authority, which

Huber has neither discussed nor distinguished (Pet. App. 25).

CONCLUSION

As the foregoing indicates, the decision of the Fourth Circuit is consistent with decisions of other United States courts of appeals, as well as the decisions of this Court on the same matters. Thus, there is no important question of federal law which has not been, but should be, settled by this Court. The Petition for a Writ of Certiorari should therefore be denied.

Respectfully submitted,

BARBARA M. COOK
Howard County Solicitor
RICHARD E. BASEHOAR
Senior Assistant County Solicitor
Counsel of Record
Howard County Office of Law
George Howard Building
3430 Courthouse Drive
Ellicott City, Maryland 21043
(410) 313-2104
Counsel for Respondent

September 15, 1995

APPENDIX

APPENDIX

[Filed Feb. 22, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. K93-606

JOHN HUBER,

Plaintiff

v.

HOWARD COUNTY, MARYLAND,

Defendant

AGREED STATEMENT OF FACTS

1. Howard County, Maryland ("County") is a chartered County formed pursuant to the legislative grant of authority contained in Article 25A of the Annotated Code of Maryland.

2. Prior to the adoption of the Charter form of government by Howard County voters in 1969, fire, rescue and emergency medical services were controlled by volunteer fire corporations. These corporations were formed and presently exist as non-profit corporations under Maryland law.

3. In adopting the Charter form of government in 1968, voters in Howard County, Maryland approved Section 413 of the Howard County Charter ("Charter") which recognized the concurrent existence of the existing volunteer fire corporations and the Department of Fire and Rescue Services created by the Charter. Section 413 of the Charter was repealed and reenacted as Section 1110 of the Charter by Council Bill 69 of 1980, which was

approved by the voters of Howard County, Maryland on November 4, 1980. Then, pursuant to Section 403 of the Charter, "Reorganization of the Executive Branch", the County Council deleted Section 1110 of the Charter by Council Bill 62 of 1988, and enacted and added Section 17.100, "Department of Fire and Rescue Services" to Subtitle 1 of Title 17 of the Howard County Code. These Charter and Code provisions are attached, collectively, as Exhibit 1.

4. Since the adoption of the Charter, fire and rescue services in the County have been provided by the membership of the six (6) separate and independent volunteer fire corporations and employees of the Howard County Department of Fire and Rescue Services. The employees of the Howard County Department of Fire and Rescue Services may be assigned to stations owned by the independent volunteer fire corporations, or to stations owned by Howard County, Maryland.

5. Since the adoption of the Charter, six representatives from the volunteer corporations located in the County have served on a fire and rescue services board which has acted as a link between the County and the independent volunteer fire corporations.

* * * *

48. As the position descriptions indicate, firefighting and emergency response operations are physically demanding jobs. These emergency functions may be performed under very difficult conditions and may require work at or near maximal heart rates for periods of time. Heavy protective equipment, typically weighing in excess of forty pounds, including respirators, contributes to the physical requirement.

49. As the position descriptions also suggest, firefighting personnel may be exposed to toxic substances during their work including carbon monoxide, cyanide, acrolein, hydrogen chloride, nitrogen dioxide and benzene. Hazard-

ous materials incidents and burning plastics may involve exposures to many other toxic materials.

50. As the position descriptions also suggest, firefighter and emergency response personnel must perform in a variety of weather environments.

51. The Howard County Department of Fire and Rescue Services instructs firefighters not to run at the scene of an emergency.

52. Generally speaking, on a shift-by-shift basis, a firefighter employed by the County can be required to perform as the driver of a ladder truck, engine or rescue squad vehicle, as an officer of a ladder truck, engine or rescue squad vehicle, as a firefighter on a ladder truck, engine or rescue squad vehicle; or as an ambulance driver or a member of an ambulance crew.

53. As a driver, the duties of a firefighter employed by the County include, but are not limited to making apparatus checks and repairs, driving apparatus to and from emergency calls, acting in the capacity of truck operator, pump operator or rescue squad vehicle operator on the scene of emergency calls and performing duties of a firefighter.

54. As an Officer, the duties of a firefighter employed by the County may include leading and supervising firefighters assigned to a piece of fire apparatus and performing the duties of a firefighter.

55. As a firefighter, the duties of a firefighter employed by the County include pulling charged and uncharged hoselines, throwing and raising ground ladders, opening holes in roofs and walls using an axe or various other tools, and gaining entry through a locked door.

56. The duties of a firefighter employed by the County may also include the operation of heavy duty extrication tools, the participation in salvage and overhaul operations to include moving furniture, removing ceilings, and the putting into service of standpipe packs in highrise buildings.

57. The duties of a firefighter employed by the County are often performed in full protective equipment, including breathing apparatus.

58. The duties of a firefighter employed by the County as an ambulance driver or member of an ambulance crew include carrying equipment to the scene of an emergency, often up multiple flights of stairs, and carrying patients on stretchers from emergency scenes to the ambulance, as well as unloading the same patients at the hospital. Duties in this role also include performing various emergency skills such as patient assessment, controlling bleeding, airway maintenance, cardiopulmonary resuscitation and splinting fractures.

59. In addition to these activities, firefighters employed by the County are often required to make building inspections, public presentations, public education, investigations of the cause and origin of fires, and to conduct training and in-service training.

60. In addition, firefighters employed by the County are required to participate in physical training exercises and to submit to physical agility testing and a medical examination on an annual basis. The physical agility test in the years 1985 to 1992 consisted of a 1½ mile run, chair dips and sit-ups against an age-based scale (Exhibit 16). In 1993, the physical agility test was changed and is now comprised of the performance related tasks specified in Exhibit 17. Failure to successfully complete the physical agility test or medical examination may result in retesting, fitness for duty evaluations, removal from operational activities or recommendations for retirement or dismissal.

61. Individuals who are members of a volunteer fire corporation and volunteer their services to the volunteer fire corporations are not required to meet all of the requirements established for career firefighters, and are not

required to participate in County sponsored in-service training, physical training, or physical agility testing.

62. Members of the volunteer fire corporations may perform the functions required of career firefighters but are not required to perform the functions of career firefighters. For example, members of volunteer fire corporations may choose not to respond when an emergency call is made or may choose to limit the functions which they perform during a fire emergency. A member of a volunteer fire corporation who is qualified to drive a vehicle but who cannot physically climb or lift a ladder may, for example, drive a vehicle during an emergency but may choose not to participate in other operational activities.

63. Numerous members of volunteer corporations, however, perform some but not all operational activities.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. K 93-606

JOHN HUBER,

Plaintiff

v.

HOWARD COUNTY, MARYLAND,

Defendant

Pursuant to Notice, the deposition of JAMES L. GAMBLE, M.D. was taken on Thursday, January 27, 1994, commencing at 2:06 p.m., at Med. Therapy, 3310 Eastern Avenue, Baltimore, Maryland 21224, before Kelly Weitzel Alford, a Notary Public.

* * * *

[6] Q Okay. Anything else?

A No.

Q Did you receive any awards or honors from the Johns Hopkins University School of Hygiene and Public Health?

A No.

Q At the University of Miami School of Medicine you received your degree in 1974, correct?

A That's correct.

Q Did you take any specialized courses there?

A No. It was just—I mean that's the straight—well, you get to do your senior rotations but that's about it.

Q Okay. As far as your internship, did you do an internship?

A Union Memorial, straight medicine.

Q What about residency?

A That was a combination of Johns Hopkins and University of Cincinnati and Dow Chemical.

Q Okay. And what did you study during the [7] course of your residency?

A Occupational medicine.

Q When you say occupational medicine, was there any other program or specialty studied within the field of occupational medicine?

A Well, it was a combination of epidemiology and there were some rehabilitative medicine, a lot of toxicology, you know, some dermatology and some material about disability evaluations.

Q Did you study anything relating to pulmonology?

A Yes.

Q What was the course of study that you followed with respect to pulmonology?

A I don't recall the exact nature, I mean the name of the course, but there was an extensive study of pulmonology, including asthma, black lung, that sort of thing.

* * * *

[11] Q Are you on the staff of any hospitals currently?

A No.

Q Are you affiliated with or have any privileges at any medical institution at the present time?

A No.

Q Do you have any teaching appointments? I don't see any noted on your CV.

A No.

Q As far as your professional memberships which are noted on the CV, you have first the American College of Occupational Medicine, what is the membership requirement for that, if any?

A Pay your dues.

* * * *

[15] Q Okay. Have you ever testified on behalf of a defendant?

A No.

Q Were you ever qualified in any court as an expert in the field of pulmonology?

A Never.

Q Other than your testimony—

A In a court?

Q In a court, yes.

A No, I have not been—no one has ever asked me to be qualified.

Q Have you ever testified before administrative agencies?

A What do you mean by—I don't know what I'm—

Q Well, tribunals other than courts, agencies, Workmen's Compensation Commission?

A Workmen's Compensation Commission I had.

Q Okay. And since January of 1988 how many times have you testified before the Workmen's [16] Compensation Commission?

A Once, once.

Q Once. Was that on behalf of a claimant or an employer?

A A claimant.

Q Have you provided testimony—you've indicated that you provided testimony in depositions?

A Uh-huh.

Q Since January of 1988 to the present, how many occasions have you provided depositions?

A Oh, I don't know, probably about six.

Q When you've given the depositions has it been on behalf of a plaintiff or a defendant?

A On behalf of a plaintiff.

Q Okay. And—

A The plaintiff attorneys don't like us, I mean I wouldn't mind doing defendant work also, but plaintiff attorneys don't like people switching sides.

Q Do you work frequently with plaintiffs' attorneys?

A Yes.

[17] Q What plaintiffs' attorneys do you work with?

A I have about 200 that we work with.

Q Okay. And what is the nature of your work with them?

A Well, workmen's comp, automobile accidents primarily.

Q And what type of duties do vou perform for them?

A Well, we treat their patients, get them better and write reports so that the, to describe the care that they received and when necessary then we testify.

Q In terms of your present employment, I picked up a card out front, the name of the organization for which you worked is Med. Therapy; is that correct?

A Right.

Q What interest, if any, do you have in Med. Therapy?

A All of it.

Q Well, you're the owner of Med. Therapy?

A Yes.

[18] Q And how many employees does Med. Therapy have?

A I'm not sure. I think about 12.

Q Okay. And how many physicians are employed by Med. Therapy?

A Just myself.

Q What are the scope of your duties currently for Med. Therapy?

A Administarative, disability evaluations, patient care, I do some of the physical therapy too.

Q Are all the clients and patients whom you serve referred to you by attorneys for evaluation?

A No, we have some people that come for, we have some medical assistance practice and we, sometimes patients come to us because we have a reputation for taking care of people well.

Q You indicate that you do work for about 200 plaintiffs' attorneys. What percent of your business is referred to you by plaintiffs' attorneys?

A Probably—I don't know, I've never really measured it, but I would guess it's about 60 percent.

* * * *

[20] Q So since—

A It would be basically '89, I think.

Q Well, in our CV you indicate that you've been involved in private medical practice in Maryland since January of '88?

A I had an office on Read Street at that time.

Q Okay. And what was the nature of your practice on Read Street?

A Basically the same thing that we do here.

Q Was there a name to that business on Read Street?

A No.

Q Were there any other doctors employed at your address on Read Street?

A No.

Q Doctor, what percent of the income of Med. Therapy, Inc., approximately comes from work that is referred to you by attorneys, plaintiffs' attorneys?

A What part of the income?

Q Yes.

[21] A I would, again, I don't know because I've never really measured it, but probably about 90 percent.

Q Since January of 1988 to the present, Doctor, approximately how many asthma patients have you treated?

A '88 to present?

Q Yes.

A Probably about eight. Probably more than that. Now that I think of it probably more like 20.

Q What was the nature of the treatment that you provided?

A Well, here is basically bronchodilators. Elsewhere it was we would use, I mean or while I was working at Johns Hopkins Urgent Health Care Plan and then we'd use the ventilators and that sort of thing.

Q When you speak of the Johns Hopkins Health Plan Urgent Care Center, your CV indicates that you were associated there between September of 1988 and 1989, when did you terminate your association there, what months of 1989?

A I don't know, I can't remember.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. K-93-606

JOHN HUBER, M.D.,

Plaintiff

vs.

HOWARD COUNTY, MARYLAND,

Defendant

The Deposition of MICHAEL G. HAYES, M.D. was taken on Friday, January 21, 1994, commencing at 2:20 p.m., at Maryland General Hospital, 827 Linden Avenue, Baltimore, Maryland before Sandra D. Jerosimich, Notary Public.

* * * *

[12] In this instance, I'm trying to sort of cut this off at the pass before it gets started. Had he come to me and wanted to go into the painting business, I would have said are you out of your mind? That's not a job that an asthmatic should go into. The risk is, yes, much higher for you than it is for someone else, for somebody who has normal airways.

Q. Well, to take your example and to apply it into this case, perhaps, when you talk about Mr. Huber incurring some additional risk and additional problems, are you talking about him becoming disabled further as a result of this occupation of firefighter?

A. Absolutely.

Q. Okay. And are you talking about that as a possibility or probability?

A. Probability.

[13] Q. Meaning what?

A. Well, again, can I predict the outcome? There's so many variables, you can't ask me to do that. I mean, if you told me what his conditions were going to be the entire time, you know, maybe I could be a little more

specific, but again, there are a lot of variabilities, but the point is that unless you're going to tell me that he's going to be an office firefighter, if you're going to tell me that he's not going to be exposed to any inhalants of any kind, then his risk is greater.

Q. Greater than someone without—

A. Greater than normal, greater than someone with basically normal airways.

Q. Okay. Can you quantify that risk?

A. No, but I think it's high. I can't give a number to it, but I mean, much better than a 50/50 chance, I think, of having serious deleterious effects particularly over any length of time. It could be that he would go to his first fire and have a severe asthma attack and die on the [14] spot. It may be that he didn't.

Q. Does the seven years of experience that he's had indicate anything to you?

MR. BASEHOAR: Objection.

A. No.

Q. Why not?

A. For the example that I talked about before, that it could happen, he could get into a very serious business one episode or it might not be for ten episodes. I mean, the problem with asthma is that it's so unpredictable that the person can be fine one minute and so, so distressed in the next minute, I ain't talking about a few, you know, hours, I'm talking about minutes here that, you know, terrible things can happen in a very short period of time. I mean, all the seven years tells me is that, as I say, that I suppose that's what sort of led him to this. I mean he felt that if he had done that and had gone reasonably well that therefore, that goes on for a lifetime, but I don't think that's predictable and [15] I think that the statistics that you have, I don't have them at my fingerips, that you have that talk about pulmonary complications of fire fighting just add to the fuel, fuel to the fire, if you will, to pun a little, to the situation.

* * * *